# The Strange Case of the Publicity of the Brexit Legal Advice

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One of the most remarkable episodes of the most remarkable Brexit saga is the strange case of the publicity of the Brexit legal advice.

If incoherence would be the utmost political virtue, it would be possible to conclude that Theresa May's government has been a most virtuous government. On the one hand, the incumbent Tory prime minister has pledged once and again to stand fast to the democratic principle. Her mantra "Brexit means Brexit" left everybody in the dark concerning the actual implications of British secession from the European Union, but at least seemed to indicate that she was resolved to implement the *volonté générale* of the citizens of the United Kingdom, as expressed in the referendum of 2016. On the other hand, however, no government in recent history has despised more explicitly the authority of the institution that remains the ordinary embodiment of the democratic will, that is, the British Parliament. Judges had to force the premier's hand to ensure that it was Parliament, not Cabinet, who pulled the trigger on Article 50. Last week the House of Commons had to declare the executive in contempt of Parliament to be provided with the full text of the legal advice on the so-called "Brexit deal". The very recent memories of the maneouverings of Blair's government to cajole Parliament into believing there were no major constitutional objections to joining the "coalition" of the willing and attacking Iraq in the absence of a UN Security Council Resolution fortified the resolve of both Labour MPS and Tory backbenchers. It is true, as Loughlin and Tierney have recently shown, that the Brexit referendum reveals the tensions at the core of the "classical" British doctrine of sovereignty, which identifies sovereignty with parliamentary sovereignty, if only because the fundamental decision on Brexit was taken by the people, not the Crown in parliament. The actions of Theresa May's government seem however to aim at reducing both popular and democratic sovereignty to an empty shell before the incumbent Prime Minister and her cabinet are kicked out of power.

However, the case of the publicity of legal advice is indeed strange not only on account of what has transpired on the British isles, but also of what has not happened on the continent. Perhaps I was distracted, but after intense googling I have not been able to find any report of officials of the European Union, or for that matter, national political leaders, censuring May's manoeuvres to keep the British Parliament in the dark, or for that matter, rejoicing at the fact that the British Parliament prevailed at the end of the day. We may speculate about the many reasons why this is so.

What is a matter of fact, and not a mere conjecture, is that the prerogative that the British government has failed to arrogate itself is actually enjoyed by the European Council, the European Commission and the European Central Bank. It is true that in purely formal terms, Regulation 1049/2001 entrenches the general principle of

openness. Moreover, the Court of Justice has ruled that from such general principle follows the more concrete one of the publicity of the legal opinions of the legal services of European institutions. However, several exceptions to the principle are established in the same Regulation 1049/2001. They include not only a number of public interests (among which, public security, the integrity of financial, economic or monetary policy, and the protection of the negotiation position of the Union in international affairs) but also to the safeguard of "legal advice". What is decisive is how the Council, the Commission and the European Central Bank make use of such exceptions (advised by, guess who, their legal services themselves). Inhouse lawyers at the service of such institutions have reenginered Bentham's and Marx's critique of, respectively, natural and burgeois rights: They have found the way of paying lip service to the principle of publicity of legal advice while hollowing it out through the widest of interpretations of the depth, breadth and width of the exceptions to it. As a result, the legal advice on the basis of which the most critical decisions taken during the financial, fiscal or refugee crises were adopted remains classified or was provided in ways that ensure that the public will never know its content (for example, it is claimed that the advice was given orally). As is well-known, the de facto expulsion of one Chancellor of the Exchequer from a crucial Eurogroup meeting was grounded on the claim made by the Secretariat that the Eurogroup was legally inexistent and therefore its meetings were not subject to any specific rule of procedure. Such advice may or may not be based on legal advice provided by the legal services of the Council, which in its turn may or may not have been put into writing.

The veil of secrecy is only broken by occasional leaks (by definition subservient to the more or less obscure interests of the leaker, not to the public interest). In this regard, as in many others, the European Parliament has preferred to bark rather than to bite. The insufficient pressure it has exerted has so far not only reflected the courage of isolated MEPs, but has tended to overfocuse on the protection of the institutional powers of the assembly, rather than to combat opacity in view of the deleterious effect it has in the democratic process as a whole. Opacity hurts not only institutional publics, but also democratic public opinion and discussion. Admittedly, the pending case De Masi and Varoufakis v ECB may contribute to unleash a different dynamics. But not only the jury is still (literally) out, but the MEP involved in the case has since become a national parliamentarian.

There is a history to all this. In the early days of European integration, it was not fully implausible (even if at the end of the day hardly persuasive) to claim that the very 'international' character of the Communities rendered advisable sheltering the legal services from too close a public scrutiny, which could perhaps undermine the forging of a genuinely supranational vision, hardly to be expected to emerge if there was constant blaming and shaming of legal opinions and institutional lawyers along national lines. But the expiry date of such arguments has long passed. Indeed, such line of reasoning is manifestly bogus once the said legal services promote a 'constitutional' reading of European law. If indeed European law is worthy of being constructed in a constitutional key, then the publicity of legal opinions should also be approached from a constitutional perspective, which would require

automatic publicity, not generalised confidentiality, as is the case in all democratic constitutional states.

In that regard, the invocation of one form or the other of the ‘attorney#client’ privilege is the poorest of arguments. Leaving aside the fact that no public institution can be regarded as an ‘ordinary client’, it is to be expected, and indeed desired, that legal advice offered to public institutions be provided with the expectation that it will be made public at the end of the day. Citizens have a collective interest in advice being so given as to stand the test of being rendered public. Not only political decision# making in a democratic state *should* be based on public, not private reasons; but those providing legal advice to public institutions should not be given the impression that they are advising those holding public office *in personam*. It is one thing to be the lawyer of Her Majesty’s government; a very different one to be the personal lawyer of Mrs May. But by the same token it is one thing to be the lawyer of the Commission; another to be the lawyer of Mr Juncker (or perhaps we should say Mr Selmayr). The only effective way of keeping the proper distinctions in place is for the general rule to be that legal opinions are *always* rendered public. Certainly, there can be good reasons to delay publication. But they should be the exception not only formally, but also in practice. And even when such extraordinary reasons concur, what is justified is not to refuse publication of the full advice, but the redaction of the passages the publication of which would undermine the public interest; and not to postpone publication *ad calendas graecas* (in the European case, the 30-year rule) but simply to delay it within reasonable time limits.

Those of us celebrating the triumph of the British Parliament over Mrs May’s government on access to the full legal advice on Brexit should find the courage and resolve to request a radical shift of policy regarding the transparency of the legal advice provided to European institutions. So far, Regulation 1049/2001 and the rulings of the European Court of Justice have been more ornamental than effective. It is high time they stopped being so. May’s failure to keep the advice of the Attorney General on Brexit secret is a powerful reminder that democratic constitutions, such as the British one, do not (and should not be expected to) prevent governments from pursuing the most foolish of policies (and who can avoid the conclusion that Theresa May’s negotiating strategy was utterly reckless?), but, among other things, they set tangible limits to the executive power, limits without which democratic choice is hollowed out. Can we say the same about the fundamental norms organising power in the European Union?

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